Emmanuel E Okwuosa & Ors v Owners of the ship and other persons interested in the ship MV Brihope (Hong Leong Leasing Sdn Bhd, Interveners)

HIGH COURT (PENANG) — ADMIRALTY IN REM NO 27-2-94
VINCENT NG J
13 JANUARY 1995

Shipping and Navigation *— Merchant shipping — Wages of seamen — Claim for unpaid wages — Period for which wages claimable — Whether mortgagees of vessel have locus standi to question computation — Merchant Shipping Ordinance 1952 s 122(c)*

Shipping and Navigation *— Merchant shipping — Contract of employment of seamen — Whether issue of writ claiming unpaid wages terminates contract — Whether priority of payment from proceeds of sale of vessel as against other claimants lost — Whether there is maritime lien over vessel*

Civil Procedure *— Summary judgment — Admiralty in rem action — Whether order for sale of vessel in admiralty action in rem may be obtained by summons for summary judgment — Rules of the High Court 1980 O 14*

Shipping and Navigation *— Action in rem — Arrest of vessel — Summary judgment — Judicial sale of vessel — Whether ship properly arrested at the relevant time — Whether court should entertain application to decide order of priority of payment out of proceeds of sale — Setting of order of priorities*

The plaintiffs applied by notice of motion for an order, inter alia, for the determination of the priority of payments to the several claimants against the funds deposited into court from the proceeds of the sale of a vessel, the MV Brihope ('the vessel') and for the payment out of the amounts found due to the various claimants. The plaintiffs were the master and crew of the vessel who had obtained the order for the sale of the vessel (encl 19) following the defendants' failure to pay their wages. The interveners were the mortgagees of the vessel which was the security for two loans advanced to the defendants. The caveators had caveated against the release of the vessel as owners of certain cargo laden on board the vessel which the defendants had failed to deliver. They fully supported the plaintiffs' application. The interveners, however, disputed the quantum payable to the plaintiffs, being that the plaintiffs' wages accruing after 31 March 1994 should not be allowed, as the application through which the order for sale was obtained only covered the plaintiffs' accrued wages up to 31 March 1994. The plaintiffs had claimed wages due up to the day after the handing over of the vessel to the successful bidder on 24 November 1994. It was also contended by the interveners that as the contract of employment between the defendant shipowner and the plaintiffs had expired on 31 March 1994, the wages accruing thereafter should be assessed and paid only after the discharge of the priority of distribution due to the interveners or mortgagees. The interveners further questioned the correctness of

A the procedure adopted by the plaintiffs in encl 19 where the order for the sale of the vessel was obtained by the plaintiffs by summons under O 14 of the Rules of the High Court 1980 ('the RHC'), instead of by motion for judgment. It was lastly argued by the interveners that the vessel was at the time of the sale not under arrest in the action in which it was sold, it having been arrested in some B other action. Therefore, the interveners contended that the court should not entertain this application.

Held, allowing the plaintiffs' application:

(1) The plaintiffs' wages for the period after 31 March 1994 could C still be validly included in the final quantum of their claim by virtue of s 122(c) of the Merchant Shipping Ordinance 1952 ('the Ordinance') and considering the fact that the computation of the wages was made on the same continuing basis as that adopted in encl 19. Furthermore, the issue of a writ claiming only wages and other moneys due did not have the effect of D ending the contract of service, with the consequence that wages continued to accrue after the issue of the writ.

(2) The interveners were mortgagees and not the employers of the plaintiffs with no privity to the terms and conditions of employment. As such, they did not have the locus standi to raise E the issue on the plaintiffs' salary claims.

(3) It is trite law that every seaman and master of ship has a maritime lien for his wages over the vessel he serves. This present admiralty action was clearly an action in rem brought against the vessel and when it was sold, the plaintiffs' claim for wages ranked in priority F over the claims of the interveners, the caveators and the defendants. The interveners' right was only limited to partaking in the proceeds of sale according to the well-settled order of priority of distribution.

(4) Order 14 r 1(2)(c) of the English Rules of the Supreme Court G 1965 clearly excludes the application for summary judgment in an admiralty action in rem. Order 14 r 1 of the RHC, however, has no such provision. Furthermore, the plaintiffs could apply for an order for sale in their application for summary judgment and need not apply separately by motion. As such, the plaintiffs could apply under O 14 in this present admiralty action in rem H and the procedure adopted by them in encl 19 did not run foul of the RHC.

(5) Under O 29 r 4 of the RHC, the court is clothed with general overriding power to order the sale of property which is of a perishable nature or likely to deteriorate if kept. In the present I case, it was necessary and expedient to make an order for sale because any further delay would only cause the condition of the vessel to deteriorate and reduce its sale price.

(6) An arrest of a vessel prior to an application to obtain an order for appraisement and sale, is primarily for the practical purpose of

obtaining security for the satisfaction of any judgment that is eventually obtained in a sale pending litigation and, for the purpose of establishing jurisdiction where the shipowners are domiciled in a contracting state under the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968. The present case, however, concerned a judicial sale after the merits of the case had been heard and a final judgment obtained. In any case, the vessel was legally and continuously under arrest and in the custody of the court from 26 March 1994 until its sale and handing over on 24 November 1994.

(7) Order 70 r 21(1) of the RHC allows any party who has obtained judgment against a ship in an action in rem to apply to the court by motion for an order determining the order of priority of the claims against the proceeds of the sale of the ship. Thus, the court could entertain this application.

(8) Although the determination of priorities is an equitable jurisdiction, in practice, the court follows the well-settled order of priority unless there are any particular circumstances where justice requires it to disturb the prima facie order of priority. The court thus allowed the plaintiffs' application and directed payment out of the proceeds of the sale of the vessel in the order specified.

Per curiam:

(1) Cases which have held that the application for summary judgment is not available in admiralty actions must be read with caution in Malaysia as the English Rules of the Supreme Court 1965 and the Singapore Rules of the Supreme Court 1970 have been amended several times in this respect.

(2) In Malaysia, admiralty cases occur only rarely and we do not have, nor is it justified for us to have, an admiralty court, governed by specific procedure and rules for admiralty proceedings. As such, it is impractical and unrealistic for Malaysian courts to be too strict on the procedure employed by the parties in admiralty cases.

[Bahasa Malaysia summary

Plaintif telah memohon melalui notis usul bagi perintah, antara lainnya, untuk menentukan prioriti pembayaran kepada beberapa penuntut terhadap wang yang telah dibayar ke dalam mahkamah daripada hasil jualan sebuah kapal, MV Brihope ('kapal itu') dan untuk perintah bagi pembayaran keluar jumlah yang didapati patut dibayar kepada penuntut itu. Plaintif-plaintif adalah ketua kapal dan anak-anak kapal kapal itu yang telah memperolehi satu perintah untuk jualan kapal itu (lamp 19) berikutan daripada kegagalan defendan untuk membayar upah mereka. Pencelah merupakan pemegang gadai-janji kapal itu yang menjadi cagaran untuk dua pinjaman yang telah diberikan kepada defendan. Pengkaveat, sebagai

A pemunya kargo tertentu yang dimuatkan di atas kapal itu, telah memasukkan kaveat terhadap pelepasan kapal itu kerana defendan gagal menghantar-serahkan kargo tersebut. Mereka telah menyokong dengan sepenuhnya permohonan plaintif itu. Pencelah, walau bagaimanapun, mempertikaikan jumlah yang patut dibayar kepada plaintif. Hujah pencelah ialah upah plaintif yang terakru selepas 31 B Mac 1994 tidak patut dibenarkan kerana permohonan yang menghasilkan perintah jualan itu cuma merangkumi upah plaintif yang terakru sehingga 31 Mac 1994. Plaintif telah menuntut upah sehingga hari selepas penyerahan kapal itu kepada pembeli yang berjaya pada 24 November 1994. Juga dihujah oleh pencelah bahawa C oleh kerana kontrak pekerjaan di antara defendan dan plaintif telah luput pada 31 Mac 1994, upah yang terakru selepas itu patut ditaksirkan dan dibayar cuma selepas wang yang kena dibayar kepada pencelah atau pemegang gadai-janji dibahagikan mengikut prioriti. Pencelah selanjutnya mempersoalkan ketepatan prosedur yang telah digunakan oleh plaintif di dalam lamp 19 di mana perintah jualan D kapal itu telah diperolehi oleh plaintif menerusi saman di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan bukan menerusi usul untuk penghakiman. Akhirnya pencelah berhujah bahawa kapal itu pada masa jualan tidak berada di bawah tangkapan di dalam tindakan di mana ianya telah dijual, memandangkan yang ia E telah ditangkap di dalam tindakan yang lain. Oleh itu, pencelah berhujah bahawa mahkamah tidak patut melayani permohonan ini.

Diputuskan, membenarkan permohonan plaintif itu:

(1) Upah plaintif untuk tempoh selepas 31 Mac 1994 masih boleh F dimasukkan dengan sah di dalam jumlah muktamad tuntutan mereka mengikut s 122(c) Ordinan Perkapalan Saudagar 1952 ('Ordinan itu') dan mengambil kira hakikat bahawa pengiraan upah itu telah dibuat atas dasar berterusan yang sama seperti yang digunakan di dalam lamp 19. Lagipun, pengeluaran sesuatu writ untuk menuntut upah sahaja dan lain-lain wang yang kena G dibayar tidak mempunyai kesan menamatkan kontrak perkhidmatan, dan kesudahannya upah terus terakru selepas pengeluaran writ itu.

(2) Pencelah adalah pemegang gadai-janji dan bukan pihak yang mengupah plaintif. Mereka tidak mempunyai priviti kepada terma H dan syarat pekerjaan. Oleh itu mereka tidak mempunyai locus standi untuk menimbulkan isu tentang tuntutan upah plaintif.

(3) Adalah menjadi undang-undang mantap bahawa setiap anak kapal dan ketua kapal mempunyai satu lien kelautan untuk upahnya ke atas kapal di mana beliau berkhidmat. Tindakan admiralti ini jelasnya adalah satu tindakan in rem yang telah I dibawa terhadap kapal itu dan apabila ianya dijual, tuntutan plaintif untuk upah mendapat prioriti melampaui tuntutan-tuntutan pencelah, pengkaveat dan defendan. Hak pencelah cuma terhad kepada penyertaan dalam hasil jualan mengikut aturan prioriti pembahagian yang telah ditetapkan.

(4) Aturan 14 k 1(2)(c) Kaedah-Kaedah Mahkamah Agung Inggeris 1965 jelasnya tidak membenarkan permohonan untuk penghakiman terus di dalam satu tindakan admiralti in rem. Aturan 14 k 1 KMT, walau bagaimanapun, tidak mempunyai peruntukan sedemikian. Lagipun, plaintif boleh memohon untuk suatu perintah jualan di dalam permohonan mereka untuk penghakiman terus dan tidak semestinya memohon secara berasingan melalui usul. Oleh kerana itu, plaintif boleh memohon di bawah A 14 di dalam tindakan admiralti in rem ini dan prosedur yang telah digunakan oleh mereka di dalam lamp 19 tidak menyalahi KMT.

(5) Mengikut A 29 k 4 KMT, mahkamah diberikan kuasa am yang utama untuk memerintahkan jualan sesuatu harta yang mudah musnah atau mungkin merosot jika disimpan. Di dalam kes ini, adalah perlu dan wajar untuk membuat satu perintah jualan kerana apa-apa kelengahan selanjutnya hanya akan menyebabkan keadaan kapal itu bertambah buruk dan merendahkan harga jualannya.

(6) Penangkapan sesuatu kapal sebelum permohonan untuk memperolehi satu perintah taksiran dan jualan dilakukan terutamanya bagi tujuan praktik mendapat cagaran untuk pembayaran sebarang penghakiman yang akhirnya diperolehi di dalam satu jualan sementara menunggu litigasi dan, bagi tujuan mendirikan bidang kuasa di mana tuan punya kapal berdomisil di sebuah negara pejanji di bawah Konvensyen Tentang Bidang Kuasa dan Penguatkuasaan Penghakiman di dalam Perkara Sivil dan Perdagangan 1968. Kes ini, walau bagaimanapun, berkenaan dengan satu jualan kehakiman selepas merit kes itu telah didengar dan satu penghakiman muktamad telah diperolehi. Dalam apa keadaan sekalipun, kapal itu memangnya berada di bawah penangkapan dan jagaan mahkamah secara sah dan berterusan dari 26 Mac 1994 sehingga jualan dan penyerahannya pada 24 November 1994.

(7) Aturan 70 k 21(1) KMT membenarkan mana-mana pihak yang telah memperolehi penghakiman terhadap sesuatu kapal di dalam satu tindakan in rem untuk memohon kepada mahkamah melalui usul untuk perintah yang menentukan aturan prioriti tuntutan terhadap hasil jualan kapal itu. Oleh itu, mahkamah boleh melayani permohonan ini.

(8) Walaupun penentuan prioriti adalah satu bidang kuasa ekuiti, pada praktiknya, mahkamah mengikuti satu aturan prioriti yang telah ditetapkan kecuali terdapat apa-apa keadaan khas di mana keadilan memerlukannya mengganggu aturan prioriti yang prima facie itu. Mahkamah oleh itu membenarkan permohonan plaintif dan mengarahkan pembayaran keluar hasil jualan kapal itu dalam aturan yang ditetapkan.

Per curiam:

(1) Kes-kes yang telah memutuskan bahawa permohonan untuk penghakiman terus tidak boleh didapati di dalam tindakan-tindakan admiralti mestilah dibaca dengan berjaga-jaga di Malaysia kerana Kaedah-Kaedah Mahkamah Agung 1965 Inggeris dan Kaedah-Kaedah Mahkamah Agung 1970 Singapura telahpun dipinda beberapa kali dalam segi ini.

(2) Di Malaysia, kes-kes admiralti jarang timbul dan kita tidak mempunyai, mahupun boleh dipertahankan untuk kita mempunyai, satu mahkamah admiralti yang dikawal oleh prosedur dan peraturan yang khas untuk prosiding admiralti. Oleh kerana itu, adalah tidak praktik dan tidak realistik jika mahkamah di Malaysia mengawal dengan terlalu ketat prosedur yang digunakan oleh pihak-pihak di dalam kes admiralti.]

[*Editorial Note*: The interveners have appealed to the Court of Appeal vide Civil Appeal No P–02–69–94.]

Notes

For cases on claims for wages of seamen, see 11 *Mallal's Digest* (4th Ed) paras 1240, 1241, 1247.

For cases on maritime lien, see 11 *Mallal's Digest* (4th Ed) paras 760, 768, 830, 1247.

For cases on summary judgment for order for sale of vessel, see 11 *Mallal's Digest* (4th Ed) paras 812–814, 830.

For cases on judicial sale of vessel, see 11 *Mallal's Digest* (4th Ed) paras 760, 762, 768.

Cases referred to

Jacobs v Booth's Distillery Co (1901) 85 LT 262 (folld)

The 'August 8th'; The 'August 8th' Owners v Costas Bachas [1983] 1 MLJ 281 (folld)

The 'Juliana' (1822) 2 Dods 504 (refd)

The 'Lord Strathcona' [1925] P 143 (folld)

The 'Minerva' (1825) 1 Hagg 347 (refd)

Vogiatzis & Ors v Owners of Steamship Fairport [1967] P 167; [1966] 2 All ER 1026; [1966] 3 WLR 426 (folld)

Legislation referred to

Merchant Shipping Ordinance 1952 ss 113(1), 118(1), 122(c), 134, 135(1), 136, 145(1)

Rules of the High Court 1980 O 14 rr 1, 3, O 29 r 4, O 70 r 21(1)

Supreme Court Act 1981 s 21(3), (4), (6) [Eng]

Rules of the Supreme Court 1965 O 14 r 1(2)(c), O 18 r 19, O 29 r 4 [Eng]

Rules of the Supreme Court 1970 O 14 r 1 [Sing]

Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968

Bernard Kok (*Ban Eng, Anual & Foong*) for the plaintiffs. A
Gideon Tan (*Lee Hishammuddin*) for the defendants.
Felix Dorairaj (*Nahappan, Dorairaj & Danker*) for the interveners.
Christina Siew (*Shearn Delamore & Co*) for the caveators.

Vincent Ng J: This is the plaintiffs' application by notice of motion ('the said motion') dated 24 November 1994 (encl 69) for an order for the B determination of the priority of payments to the several claimants against the funds deposited into court from the proceeds of sale of a vessel, MV Brihope ('the vessel') under the above admiralty in rem No 27–2–94 (Admiralty In Rem 2) and for the payment out of the amounts found due to the various claimants, and for costs. C

The plaintiffs were the master and crew of the said vessel who had obtained an order (encl 19) from Azmel Maamor J on 7 June 1994 for the sale of the vessel ('the said order for sale') by the court sheriff to satisfy the plaintiffs' claim. And the said vessel was sold for RM1.44m and released to the successful tenderer on 24 November 1994. On 29 November 1994 D at about 7pm, the master and the crew were signed off from the said vessel. There is a pending appeal by the defendants to the Federal Court against this order for sale.

The interveners were the mortgagees of the said vessel which was the security for the two loans advanced to the defendants. They had applied to set aside the said order for sale and Azmel Maamor J dismissed the E application on 12 August 1994. There is also a pending appeal against this decision by the interveners/mortgagees to the Court of Appeal. It was common ground that if the plaintiffs had not secured the order for sale, the interveners themselves would have secured such an order for sale. Indeed, the records show that the interveners had also filed a motion (encl 73) F dated 8 August 1994 in admiralty in rem No 27–1–94 (Admiralty In Rem 1) for the sale of the said vessel *pendente lite* after encl 19 was obtained, and they themselves had suggested (accepted by the court) a shipbroker for the sale. Apparently, they were unhappy with encl 19 as they had intended to secure an order for sale on terms which they had hoped would favour them on priorities in the distribution of the proceeds of sale. G

The caveators, namely, Lam Guan Chan (M) Sdn Bhd, Lam Guan Chan (S) Pte Ltd (the plaintiffs in Admiralty In Rem 1) and Continental Enterprise Ltd who were the plaintiffs in admiralty in rem No 27–3–94 (Admiralty In Rem 3) had respectively caveated against the release of the vessel as owners of certain cargo laden on board the vessel which the H defendants had failed to deliver.

The proceedings that resulted in the said order for sale was caused by the defendants' inability or refusal to pay the wages of the master and the crew of the said vessel. I understand that the interveners have now filed applications before another High Court to set aside and/or vary the orders I dated 16 April 1994 and 18 May 1994 obtained in Admiralty In Rem 1 and the order dated 28 June 1994 in Admiralty in Rem 3 in respect of the expenses for discharging the cargo, which is to be heard on 20 January 1995. In my opinion, an appeal against the decision in that pending case appears likely, even if groundless. Now, there is this appeal against my decision on

encl 69. As such, there would be three pending appeals and a further envisaged appeal caught within the tattered sails of this unfortunate vessel.

I have taken pains to promptly prepare and complete my written judgment to enable speedy resolution of the several pending appeals. The reason being that when encl 69 was heard (on 12 December 1994) the crew members were under a second extension (up to 14 December 1994) to remain in Malaysia. They were unable to finance their own transportation back to their country of origin due to not being paid their wages by the defendants for a substantial period of time. Indeed, some of the crew members who are Indonesians and who have been granted a short extension of stay by the Immigration authorities have been sleeping in the corridors of the marine police base in Penang under the anxious but tired eyes of the Immigration authorities. The Immigration authorities had already granted them three extensions for their continued stay here and may not be inclined to grant them any further extensions. Being thus keenly aware of the urgency of the matter, I have written this short judgment without a minute's delay, so to say.

The noteworthy factors governing the hearing of encl 69 are:

(1) The caveators had supported in toto the application of the plaintiffs.

(2) The defendants had consented to the setting of the priorities of payments but only objected to the payments under the second limb of encl 69.

(3) From the interveners, there was no serious objection on the priority of payment set by me on 12 December 1994 on the said motion except that they had raised two questions:

(a) they disputed the quantum payable to the plaintiffs, being that the plaintiffs' wages accruing after 31 March 1994 should not be allowed, as encl 19 itself only covered their accrued wages up to 31 March 1994. The master and crew had claimed wages due up to the day after the handing over of the said vessel to the successful bidder on 24 November 1994. It was further contended that the articles, being the contract of employment between the shipowner and crew, had expired on 31 March 1994 and, as such, the wages accruing after that date should come under assessment of damages which was payable only after discharge of the priority of distribution due to the interveners/mortgagees; and

(b) they submitted that the motion to determine priority in encl 69 ought not to be heard by this court for the reasons detailed later in my judgment.

I held that the interveners/mortgagees' contention in (a) above is without merit and is untenable. In my view, the master and crew wages for the period after 31 March 1994, though not expressly stated in encl 19, could yet be validly included in the final quantum of their claim by virtue of s 122(c) of the Merchant Shipping Ordinance 1952 ('the Ordinance') and considering the fact that the computation of the wages was made on the same continuing basis as in encl 19. It is obvious that until the sale of the vessel and final

settlement of their wages, the plaintiffs would be in no position to quantify the amounts due to them.

Section 122(c) provides:

> In the case of foreign-going ships, other than ships employed on voyages for which seamen by the terms of their agreement are wholly compensated by a share in the profits of the adventure —
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> ...
>
> (c) in the event of the *seaman's wages or any part thereof* not being paid or settled as in this section mentioned, then, *unless the delay is due to the act or default of the seaman*, or to any other reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages *shall continue to run and be payable until the time of the final settlement thereof.* (Emphasis added.)

Furthermore, the issue of a writ claiming only wages and other moneys due did not have the effect of putting an end to the contract of service, with the consequence that wages continued to accrue after the issue of the writ. See *Vogiatzis & Ors v Owners of Steamship Fairport* [1967] P 167; [1966] 2 All ER 1026; [1966] 3 WLR 426.

In our current case, the said vessel was a Malaysian registered ship and there was no port officer to discharge them. The crew had come into Malaysia under seamen permits from the Malaysian Immigration. Under s 113(1) of the Ordinance, they have to be discharged, and under s 118(1), their wages have to be paid in the presence of a port officer. Indeed, not only was there nobody to discharge them but the interveners had contested their claim every inch of the way and eventually also caveated against the release or payment out of the proceeds of sale (see encl 72). Meanwhile, the crew and the vessel had to be maintained from moneys advanced to the court sheriff by the caveators.

Furthermore, because they are mortgagees and not employers of the plaintiffs, with privy to the terms and conditions of employment, I am not satisfied as to the locus standi of the interveners to raise this issue on the plaintiffs' salary claims.

In this regard, in the English case of *The Lord Strathcona* [1925] P 143, Hill J had this to say (at p 150):

> What right have the interveners to raise this contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what locus standi they have to dispute the validity of the plaintiffs' mortgages ... As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reason of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is whether the interveners are entitled at all, or on the facts of this case, to limit the plaintiffs' right to procure a sale by the court. They cannot question the judgment in rem. Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale?

It is also trite law that every seaman has a maritime lien on his wages over the vessel he serves. See 1 *Halsbury's Laws of England* (4th Ed) at p 233

A para 338 and p 287 para 453. See also ss 145(1) and 134 of the Ordinance. Section 145 of the Ordinance further provides that the master of ship has the same rights, liens and remedies for the recovery of wages as a seaman has under the Ordinance or by any law or custom. Furthermore, a seaman not only has a maritime lien on his wages over the vessel he serves but by virtue of s 135(1) of the Ordinance, such lien is not capable of being B renounced or abandoned by any agreement. Indeed, under s 136 of the Ordinance, every seaman shall be entitled to demand and recover wages notwithstanding that the ship in which he has served has not earned freight.

By allegory, the maritime lien of the crew's wages attaches to the ship C that they serve *a la* certain oysters to rocks. The reason being that the court has always adopted a benevolent and protective attitude towards seamen to avoid overreaching by shipowners. In *The 'Minerva'* (1825) 1 Hagg 347, Lord Stowell described the disparity of bargaining power in the negotiation of special contracts in the following memorable words:

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> On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side, is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that E may be proposed to them; and on all accounts requiring protection, even against themselves.

The regard which the admiralty court has for the intellect of seamen is also illustrated by the words of Lord Stowell in another case, *The 'Juliana'* (1822) 2 Dods 504 where he said, '... the common mariner is easy and F careless, illiterate and unthinking; he has no resources, in his own intelligence and experience in habits of business ...'.

Section 21(3) and (4) of the English Supreme Court Act 1981 states that an action in rem may be brought in the High Court against the ship to satisfy the master and seamen's wages based on their maritime lien on G the ship that they serve. Such maritime lien can be enforced by an action in rem against a ship irrespective of its ownership. (See *Admiralty Jurisdiction and Practice* by Nigel Meeson at pp 71 and 74.) Hence, I hold that the current admiralty action was clearly an action in rem brought against the vessel, a fortiori, as the owners of the vessel were also the persons liable for the plaintiffs' wages.

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I cannot see how the interveners could gain on priority even had they beaten the plaintiffs to an order for sale, as it is settled law that the master and crew of a ship carries with him at all times a maritime lien for their wages against the ship that they serve and when that ship is sold at the instance of whichever party, the claim of the crew and master for wages I would, in any event, rank in priority over the claims of the mortgagees, the cargo owners and the defendants. The mortgagee's right in the event of sale of a vessel is only limited to partaking in the proceeds of sale according to the well-settled order of priorities of distribution.

I shall now turn to the interveners' second contention that this motion to determine priority ought not to be heard by this court as:

(i) the judgment (encl 19), being a judgment obtained by summons under O 14 of the Rules of the High Court 1980 ('the RHC') rather than by motion for judgment, was a judgment in personam and therefore the sale conducted by virtue thereof must necessarily be in personam; and

(ii) the said vessel was at the material time of the sale not under arrest in Admiralty In Rem 2 though it was then under arrest in Admiralty In Rem 1.

Contention (i)

A judgment in rem, eg of an admiralty court, establishing a lien may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. Apart from the application of the term to persons, *it must affect the 'res'* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.

The plaintiffs had applied for summary judgment against the defendants (under O 14 r 3 of the RHC) in their prayer (a) of encl 7 and for sale of the defendants' vessel (under O 29 r 4 of the RHC) in their prayer (c) of the same enclosure which resulted in the order under encl 19 being made. The interveners' objection here is based on the procedure applicable in English courts after 1979, where the following prevails:

It is not possible to make an application for summary judgment under O 14 of the English Rules of the Supreme Court 1965 ('RSC') in an admiralty action in rem. However, it is possible to obtain summary judgment in personam where there has been an acknowledgment of service in an admiralty action in rem, because after acknowledgment of service the action proceeds also in personam. Once summary judgment in personam has been obtained, it ought then be possible to apply by motion for judgment in rem in default of defence. The court having held that there is no defence in personam, it is difficult to imagine circumstances in which there could be a defence in rem. If a defence is served after summary judgment had been given in personam, an application could be made to have such a defence struck out under the English RSC O 18 r 19, or under the inherent jurisdiction of the court.

Cases that held that application for summary judgment is not available for admiralty actions must be read with caution as the English RSC and the Singapore RSC 1970 have been amended several times in this respect. Thus, the law prevailing in the English courts before the amendment in 1979 is consistent with the views, which I would wholly associate with, that was expressed by Halsbury LC in *Jacobs v Booth's Distillery Co* (1901) 85 LT 262, HL who had this to say:

> People do not seem to understand that the effect of O 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and

A where it was not in aid of justice that such things should continue, O 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

Closer home, the currently prevailing law is, as lucidly expressed by B Lord Brandon who delivered the judgment of the Privy Council in the celebrated case of *The 'August 8th'; The 'August 8th' Owners v Costas Bachas* [1983] 1 MLJ 281, PC. His Lordship had this to say (at p 283):

> The sole question with which their Lordships are concerned in this appeal, as was the Court of Appeal in Singapore in the appeal to it from the order C of Choor Singh J, is one of jurisdiction and it is this: by the law of Singapore, is a plaintiff in an admiralty action in rem brought by him in the High Court entitled, after he has served a statement of claim on the owners of the property proceeded against and they have entered an appearance in the action, to avail himself of the provisions of O 14 of the Rules of the Supreme Court 1970, in order to obtain, if he can, a summary judgment against such owners?

D

And further down the page he said:

> It has not been suggested, and could not sensibly be suggested, that the master's action in the present case, being an Admiralty action in rem in respect of pecuniary claims included in the Admiralty jurisdiction of the E High Court, falls within any of the exceptions contained in sub-paras (a) and (b) of para (2), or in para (3), of r 1 of O 14 referred to above. That being so, it appears to their Lordships to be clear beyond doubt that, on the true construction of O 14 of the Rules of the Supreme Court 1970, an Admiralty action in rem such as that brought by the master in the present case, as well as an Admiralty action in personam, is a kind of action in which a plaintiff is entitled to avail himself of the provisions of O 14, and in which F the court, if satisfied with regard to the merits of the case, has power to give him a summary judgment under that Order.

Order 14 r 1(2)(c) of the English RSC clearly excludes an application for summary judgment in an admiralty action in rem whereas O 14 r 1 of the Singapore RSC which is in pari materia with the RHC, has no such G provision. Hence, the Privy Council decision in *The August 8th* that O 14 procedure is applicable in an admiralty action in rem, was based on the construction of the provision in the Singapore RSC in the spirit of the dictum in *Jacobs v Booth's Distillery Co.*

Furthermore, the first plaintiff, as master of the vessel, was legally H entitled to prepare the salary account of all the plaintiffs including himself, and, as agent for the defendants in his capacity as master, such accounts are binding on the defendants. In the circumstances, there could not be any valid triable issues raised on this score in respect of the plaintiffs' O 14 application.

I It is clear from s 21(6) of the English Supreme Court Act 1981 that the High Court in exercising its admiralty jurisdiction may order any ship to be sold. Here, in any action, a court is clothed with general overriding power under O 29 r 4 of the RHC, to order the sale of property (the subject of the claim) which is of a perishable nature or likely to deteriorate if kept or in relation to which there is good reason for sale. The defendants have not

paid the wages and provisions of the plaintiffs for months and showed no intention of doing so even after the arrest and the commencement of this action. In the circumstances, it became necessary and expedient to make an order for sale and any further delay would only deteriorate the condition of MV Brihope and reduce the sale price. Though the plaintiffs could have applied for an order for sale in an admiralty action by way of motion, it does not prohibit them from praying for such an order at the same time with their application for summary judgment since 'the order for sale will usually be made a part of the decree at the hearing' instead of applying for the same separately: see 1(1) *Halsbury's Laws of England* (4th Ed, Reissue) para 460.

In the work, *Enforcement of Maritime Claims* by DC Jackson, its author had expressed the following view (at p 374) on the import of O 29 r 4 of the English RSC (which is in pari materia with our O 29 r 4 of the RHC):

> A sale to be made [O 75 r 23] is confined to property that must be under arrest but it would seem that sale under O 29 r 4 is available in all admiralty actions and indeed, the power to order sale pending suit stems from O 29 r 4.

The author seems to suggest that it is not a condition precedent for the court to order sale of the ship that the ship must be under arrest by seeking recourse to O 29 r 4. It is even suggested further that O 29 r 4 'is applicable to admiralty actions in personam and could apply to admiralty actions in rem where no property is under arrest' (see para 29/4/1 in the *Supreme Court Practice 1982* and *Supreme Court Practice 1993*).

Hence, my view is that the procedure adopted by the plaintiffs here does not run foul of the RHC. Here, admiralty cases occur only rarely and far between, and we do not have, nor is it justified for us to have an admiralty court, governed by specific procedures and rules for admiralty proceedings. Indeed, in England they have an autonomous body headed by an Admiralty Marshal, who has his own funds to administer the mechanics of a sale under the Admiralty Division. I am given to understand that Admiralty Division cases there are disposed of so speedily that parties need not have recourse to O 14 procedure. As such, it is impractical and unrealistic for Malaysian courts to be too strict on the procedures employed by the parties in admiralty cases. Such procedures should be dictated according to the justice of the situation prevailing in our country.

Contention (ii)

In support of this contention, counsel for the interveners had cited the views expressed in the book *Admiralty Jurisdiction and Practice* (1993, Lloyd's of London Press Ltd), in which its author, Mr Nigel Meeson (at p 145 under the caption 'Application for appraisement and sale pendente lite'), had this to say:

> In order to obtain an order for appraisement and sale the vessel has to be in the hands of the court, even if the application for such sale is made by her owners. The property has to be under arrest in the action in which it is to be sold, and therefore if the property is under arrest in some other action it

A should be arrested again in the action in which the application is made, and the costs of the arrest will be allowed on taxation in such circumstances.

It is clear, from my careful reading of the author's views therein and the authorities, that the arrest of a vessel prior to an application to obtain an order for appraisement and sale, is primarily for the practical purpose of B obtaining security for the satisfaction of any judgment that is eventually obtained in a sale *pendente lite* and, for the purpose of establishing jurisdiction, where the shipowners are domiciled in a contracting state under the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968. The present case concerns a judicial sale after the merits of the case have been heard and a final judgment C obtained, and it is not a sale *pendente lite*. Be it noted that MV Brihope had been arrested by the plaintiffs in Admiralty In Rem 1 in the Port of Penang since 26 March 1994. Further, the plaintiffs had also caveated against the release of the said vessel and, as the result of this caveat, the vessel was legally and continuously, from 26 March 1994 until its sale and handing D over on 24 November 1994, under arrest and in the custody of the court.

Furthermore, there is ample provision in O 70 r 21(1) of the RHC to allow any party who has obtained or obtains judgment against a ship in an action in rem to apply to the court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship.

E For all the above reasons, the interveners' second objection (as per (b) above) that this motion is not properly raised before the court, is without merits and again fails. In any event, this ground is also one of the grounds of the pending appeal to the Court of Appeal against encl 19.

The defendants' objections concerning payment out could properly F only be raised in their application for stay of execution (encl 85) pending their appeal. In the afternoon, soon after disposal of encl 69 (heard in the morning of 12 December 1994), I heard and dismissed the defendants' application for stay, together with a similar application by the interveners under encl 75.

G Issue was not taken by any party on the question of priorities of distribution per se of the proceeds of the sale. The reason being that although the determination of priorities is an equitable jurisdiction, and in theory the court exercises its discretion afresh in circumstances of each case, in practice, the court follows the well-settled order of priorities unless there are any particular circumstances where justice requires it to disturb H that prima facie order of priorities. According to the English practice, the following are the prima facie order of priorities of distribution of the proceeds of sale:

(1) The admiralty marshal's charges and expenses are a first charge on I the proceeds of sale and will be paid out in priority to any other claim. These will include the expenses he incurred in effecting the arrest, in maintaining the arrest, for example port dues, the cost of a shipkeeper and any supplies required to maintain the ship whilst under arrest, and any other expenses authorized by the court to enable the ship to be sold for the best possible price.

(2) After the expenses of the admiralty marshal have been satisfied, priority is granted to the original arresting party in respect of the costs of his action up to and including the arrest, and the costs of the party who obtained the order for appraisement and sale, up to and including the order for appraisement and sale. Of course this will in many cases be one and the same party.

(3) A claim with a maritime lien ranks first and has priority over all other types of claim. However, the maritime lien attaches to the ship in connection with which the claim arose and so where the claim is enforced by means of the sister ship provision, the claim will not be to enforce a maritime lien, but will be only a statutory right of action in rem and will have the lesser priority accorded such claims.

(4) The claim of a mortgagee is postponed to a claim with a maritime lien whether arising before or after the mortgage, and will also be subject to any claim secured by the issue of an admiralty writ in rem issued prior to the date of the mortgage even if such claim does not carry a maritime lien.

(5) The claim of others entitled to proceed by admiralty action in rem will be subject to all maritime liens and mortgages, but will have priority over general creditors of the shipowner, except those who have perfected their execution prior to the issue of the writ in rem.

(6) The claims in personam of creditors of the owner of the res will be last, having no priority.

(7) The owner of the res is entitled to the balance remaining, if any.

The interveners had also contended that the sheriff's expenses in Admiralty In Rem 1 are claimable but not sheriff's expenses and court commission in respect of Admiralty In Rem 2. This is again untenable as it would mean that the sheriff of the court may have to bear the expenses and then proceed in personam against the defendants (an exercise in futility) since, in their view, she would have no claim in rem against the proceeds of sale of the vessel. It stands to reason that as it was the said vessel that was sold by the sheriff pursuant to a court order, her expenses ought rightly be recoverable against the proceeds of sale of the very subject matter that she had sold.

The common ground here among all the parties is that the vessel had to be sold, and thus the court sheriff had to organize the sale, in any event, as directed by the court. The sheriff merely gave an account of expenses, a major portion of which were advanced to her by the two caveators, and a minor portion, even by the interveners themselves. As such, I do not think there should be any objection to the sheriff now coming to the court to claim the expenses, irrespective of whether the judgment obtained was in personam or in rem.

It is also noted that the conduct of the interveners was, in my opinion, deplorable. The court allowed retender in the sale of the said vessel upon certain terms and conditions including an undertaking by the interveners to bear all costs and expenses including provision for maintaining the ship from 22 September 1994 onwards. Indeed under encl 48, the

A interveners had attempted to vary the undertaking. However, neither the undertaking was signed by the interveners nor the draft order by their counsel, Mr Felix.

In the event, and upon the grounds adumbrated above, I allowed with costs the plaintiffs' application in terms of encl 69, and ordered
B payment out of the proceeds of sale of the said vessel in the following priorities and amounts:

(1) The court commission of RM36,025.

(2) Sheriff's expenses being:

C (a) Commission to be paid by the sheriff to the shipbroker amounting to RM31,800.

(b) Moneys advanced by the caveators under Admiralty In Rem 1 to the sheriff as sheriff's expenses amounting to RM125,000 and a further RM40,000 (RM35,000 to the crew for discharge of cargo on board and RM5,000 on the valuation report — both amounts
D in respect of Admiralty In Rem 1). A sum of RM41,370 paid in Admiralty In Rem 3 by Messrs Shearn Delamore on behalf of the caveators in Admiralty In Rem 2 (plaintiff in Admiralty In Rem 3) for the discharging agent, and another RM35,000 to the crew pursuant to the order of court dated 28 June 1994. A sum of
E RM39,066.44 to be deducted from the proceeds of sale by the court sheriff (still owing to creditors) in respect of the sheriff's expenses. And, generally, all expenses and the court's commission as per encl 86, including the sum of RM19,710 advanced by the interveners, who shall also be at liberty to include further expenses
F in respect of Admiralty In Rem 2 within two days from the date hereof.

(3) The costs for the arresting parties, namely, the plaintiffs in Admiralty In Rem 1 first, and the plaintiffs' cost in this action second. Thereafter the sheriff's costs in encl 55.

G (4) The wages for the master and crew:

(i) On the judgment sum of RM468,380 as at 31 March 1994 with 8% interest thereon (encl 19) from 1 April 1994 to 25 November 1994.

(ii) The wages accrued from 1 April 1994 to 25 November 1994
H amounting to RM289,106.08.

(5) The amount due under the mortgage.

(6) The damages for the caveators (the plaintiffs in Admiralty In Rem 1 and 3).

As item 3 and part of item 2 have not been quantified, the sheriff is to set
I aside a sum of RM150,000 to cover future claims under those parts.

Order accordingly.

Reported by Kevin Ooi